THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Mr Smithers, Jonathan

Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance

The Law Society appreciates the opportunity to contribute to the Law Council's possible submission to the Attorney-General's Industrial Relations Consultation. Our submission will respond to the discussion paper *Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance,* with a specific focus on the discussion questions set out below. The Law Society's Employment Law Committee contributed to this submission.

1. Current approach to determining penalties

1.1 What level of further increase to the existing civil penalty regime in the *Fair Work Act 2009* (Cth) could best generate compliance with workplace laws?

Pecuniary penalties act as both general and specific deterrents, intended to deter the general public from engaging in non-compliant behaviour, whilst also deterring those who are already non-compliant from continuing that behaviour.

The Law Society does not have a view on the specific level of increase to the existing civil penalty regime that would best generate compliance with workplace laws. However, given that non-compliance remains prevalent in some areas of workplace relations, the Law Society considers there to be merit in some increase to penalties in those areas, particularly where employers deliberately or knowingly underpay employees. We note that there will likely become a point at which increasing the penalties further will have muted impacts. If businesses understand that there are already significant penalties for non-compliance, doubling the penalty is unlikely to double the deterrence. In our view, the perception that there is a high likelihood of being caught is more likely to deter non-compliance than the size of the penalty.

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1.2 What are some alternative ways to calculate maximum penalties? For example, by reference to business size or the size of the underpayment or some measure of culpability or fault?

The Law Society notes that there are already common law principles that dictate the quantum of penalty imposed, by reference to the maximum prescribed, for underpayments. When determining what penalties to impose, the following factors have been considered by the Court in previous cases:[1]

a. the nature and extent of the conduct which led to the contraventions;
b. the circumstances in which that conduct took place;
c. the nature and extent of any loss or damage sustained as a result of the contraventions;
d. whether there has been similar previous conduct by the respondent;
e. whether the contraventions were properly distinct or arose out of the one course of conduct;
f. the size of the business enterprise involved;
g. whether or not the contraventions were deliberate;
h. whether senior management was involved in the contraventions;
i. whether the party committing the contraventions has exhibited contrition;
j. whether the party committing the contraventions has taken corrective action;
k. whether the party committing the contraventions has co-operated with the enforcement authorities;
l. the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
m. the need for specific and general deterrence.

These principles have been developed following decades of criminal and civil prosecutions. They operate in conjunction with other considerations, such as: treating a series of contraventions that arise out of a 'course of conduct' as one contravention;[2] and the 'totality principle',[3] which requires Courts to ensure that the total sum imposed as a penalty for multiple breaches is proportionate to the overall nature of the conduct involved. We suggest that any material departure from this approach should only occur if underpinned by a clear and persuasive rationale.

Regarding the question of whether levels of culpability or fault should influence the penalty imposed, the Law Society is of the view that both are important considerations. The Law Society supports treating cases of clear culpability and knowing breaches more seriously, reflected by proportionately greater penalties. We note this is already the approach under existing common law sentencing principles referred to above.

In our view, caution would need to be exercised before automatically adjusting the size of a penalty by reference to the size of a business. We suggest that the level of penalty imposed upon a business should be determined not only with regard to the size of the business, but also with regard to the level of culpability or fault or knowledge of a breach, and the impact of a penalty upon business profitability.

1.3 Should penalties for multiple instances of underpayment across a workforce and over time continue to be 'grouped' by 'civil penalty provision', rather than

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[1] *Kelly v Fitzpatrick* [2007] FCA 1080.
[2] *Fair Work Act 2009* (Cth) s 557(1).
[3] *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 (at [53]).

by reference to the number of affected employees, period of the underpayments, or some other measure?

The purpose of grouping penalties for multiple instances of a single contravention of a provision is to ensure that a single non-compliant decision is not disproportionately penalised based on the number of breaches that transpire as a result. The Law Society is of the view that, in such a scenario, the 'course of conduct' provisions set out in s 557 of the *Fair Work Act 2009* (Cth) (Fair Work Act) help to ensure that the penalty is proportionate to the contravention, given that breaches that transpire relate to a single error.

In our view, the situation is different where a party is involved in an ongoing breach and decides to continue, or to maintain, that breach. The Law Society recommends that in such cases, a separate decision to continue or maintain the breach should attract further contraventions and further pecuniary penalties. The Law Society supports maintaining the existing 'course of conduct' provisions enshrined in s 557 of the Fair Work Act, however, recommends the inclusion of an express provision to clarify the penalty imposed for continuing or maintaining the breach.

2. Extending Liability

2.1 Do the existing arrangements adequately regulate the behaviours of lead firms/head contractors in relation to employees in their immediate supply chains?

Franchisors and holding companies are already subject to liability for breaches of workplace laws in their franchisee/subsidiary networks, unless they can show they took reasonable steps to prevent the contraventions.[4] Accordingly, any extension of liability under the Fair Work Act for operators in a supply chain would likely relate to companies or persons unrelated to the employer that breached the provisions. Section 550 of the Fair Work Act extends liability for contraventions of the Fair Work Act to those persons that have:

- aided, abetted, counselled or procured the contravention;
- induced the contravention, whether by threats or promises or otherwise;
- been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- conspired with others to give effect to the contravention.

It is commonplace for the Fair Work Ombudsman to prosecute 'accessories' in relation to breaches of the Act, with approximately 90 per cent of Fair Work Ombudsman prosecutions against companies in 2015 also involving prosecutions against a named individual.[5] Whilst the vast majority of these accessorial liability prosecutions have related to individuals working within a business that has breached the Fair Work Act, the Fair Work Ombudsman has successfully relied upon accessorial liability provisions to achieve successful outcomes in supply chains. Two prominent examples relate to trolley collection services conducted by small trolley collection businesses, where the Fair Work Ombudsman relied upon accessorial liability provisions to secure an Enforceable Undertaking with Coles Supermarkets Australia Pty Ltd with respect to trolley collectors in 2014;[6] and Woolworths

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[4] *Fair Work Act 2009* (Cth) s 558B.

[5] Natalie James and Janine Webster, 'Regulation of Work and Workplaces: The Fair Work Ombudsman's Role in the Development of Workplace Law' (speech delivered at the Australian Labour Law Association National Conference 2016, Friday 4 November 2016).

[6] Fair Work Ombudsman, 'Coles' trolley collectors report' (media release, 9 January 2019) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20180109-coles-eu-4th-annual-report-media-release>.

Group Ltd's entry into a Compliance Partnership in 2017.[7] This demonstrates that the existing provisions have been utilised in some circumstances to hold broader supply chains to account. In our view, the current provisions are therefore adequate and are being utilised effectively.

2.2 Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be a decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?

Direct or indirect knowledge is already a factor in determining whether to extend liability to another party, and determining whether their contravention should be treated in the same way as an actual contravention.[8] Common law principles have been established to determine accessorial liability.[9] They include that:

- a person must have engaged in some conduct which "implicates or involves" him or her in the contravention, so that there is a "practical connection" between the person and the contravention;
- the expression "party to" must, on its natural meaning, indicate no more than "participates in" or "concurs in";
- in order for a person to have been knowingly concerned in a statutory contravention, that person must have been an intentional participant, with knowledge of the essential elements constituting the contravention, however it is not necessary that a person with knowledge of the essential elements making up the contravention also know that those elements do amount to a contravention;
- an accessory does not have to appreciate that the conduct involved is unlawful;
- actual knowledge of the essential elements constituting the contravention is required, and imputed or constructive knowledge is insufficient;
- the conclusion that a person has actual knowledge of the elements of a contravention by reason of that person's knowledge of suspicious circumstances coupled with a deliberate failure to make enquiries which may have confirmed those suspicions requires consideration of the person's knowledge of the matters giving rise to the suspicion, the circumstances in which the person did not make the obvious enquiry and the person's reasons, to the extent that they are known, for not having made the enquiry;
- the requisite actual knowledge must be present at the time of the contravention.

With this in mind, the Law Society considers that the Fair Work Act's accessorial liability provisions should be limited to contraventions where a party is knowingly involved in the contravention (as is presently the case), or is reckless as to whether their involvement contributes to a contravention (which is currently not expressly the case). The imposition of liability for reckless contributions to contraventions is additional to the existing regulatory regime but supports the objects of the Fair Work Act, which, amongst other things, seek to guarantee a safety net of enforceable minimum terms and conditions of employment.[10]

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[7] Fair Work Ombudsman, 'Fair Work Ombudsman compliance partnership with Woolworths a new benchmark in supply chain governance' (media release, 11 October 2017) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/october-2017/20171011-woolworths-pcd-trolley-collectors-release>.

[8] *Fair Work Act* 2009 (Cth) s 550(2)(c).

[9] *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456.

[10] *Fair Work Act 2009* (Cth) s 3.

3. Current approach to criminal sanctions

3.1 In what circumstances should underpayment of wages attract criminal penalties?

Whilst the Law Society does not have a view on whether underpayments should attract criminal penalties, we do wish to highlight important factors that should be taken into consideration by the government when making such decisions.

The criminalisation of underpayments may give rise to additional general deterrence, given that individuals involved in a contravention may become concerned about breaches affecting their own personal liberties. The criminalisation of underpayments is likely to have a further deterrence effect where companies or persons are not concerned about pecuniary penalties, because they intend to claim insolvency in the event of penalties being enforced against them and because pecuniary penalties have no substantial impact on the profitability of the company. Criminal sanctions may be suitable in very serious cases where the contraventions are repetitive or systematic, and the individual concerned has actual knowledge of the contravention or is reckless as to the contravention.

On the other hand, underpayment of wages is an inherently monetary-based malfeasance which is largely rectifiable by monetary compensation payments. Deterrence can also be implemented by way of significant pecuniary penalties, particularly in cases where intentional underpayments arise. In these circumstances, imposing additional criminal penalties of imprisonment may be unnecessarily onerous and go beyond what is required to rectify underpayment breaches. Currently, Fair Work Act prosecutions proceed on the basis that a Court must be satisfied on the balance of probabilities that an underpayment has occurred. The establishment of a criminal penalty will also require a shift of the burden of proof currently applicable. To satisfy a criminal conviction, the Court must be satisfied beyond a reasonable doubt, and *mens rea* would need to apply as is typically the case in most criminal statutory provisions. This may have the unintended consequence of making convictions more difficult to secure and prosecutions less likely to be pursued or reach successful outcomes.

Thank you again for the opportunity to provide our input to the Law Council on these issues. Should you have any questions or require further information, please contact Claudia Elvy, Policy Lawyer, on (02) 9926 0354.

Yours sincerely,

Elizabeth Espinosa.

Elizabeth Espinosa
President